STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re: **Request for Regulatory Determination filed by GAYE WELCH-BROWN concerning various rules of the CALIFORNIA STATE CONTROLLER'S OFFICE governing the discrimination complaint process for its employees**[1]	**1999 OAL Determination No. 3** **[Docket No. 97-008]** **January 8, 1999** **Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **EDWARD G. HEIDIG, Director**

HERBERT F. BOLZ, Supervising Attorney
TAMARA PIERSON, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether particular pages within the Affirmative Action Training Book and the Sexual Harassment Awareness Training Handbook of the California State Controller's Office ("SCO"), contain "regulations," which are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that most of the information contained in those pages of the training books are "regulations," issued in violation of the APA.

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ISSUE

OAL had been requested to determine[2] whether:

(1) *the SCO's discrimination complaint process*, as specified on pages 16-20 of the SCO Affirmative Action Training Book and pages 12-13 of the SCO Sexual Harassment Awareness Training Handbook;

(2) *the form SCO requires to be used when filing a discrimination complaint* (State Controller's Office Discrimination Complaint Form, as specified on page 14 of the SCO Sexual Harassment Awareness Training Handbook); and

(3) the *SCO's affirmative action complaint process*, as specified on pages 44-48 of the SCO Affirmative Action Training Book;

contain "regulations" which must be adopted pursuant to the APA.[3]

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE STATE CONTROLLER'S OFFICE?

Government Code section 11000 states:

> "As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division bureau, board, and commission."

The APA narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative department of the state government."[4] The SCO is in neither the judicial or legislative branch of state government. There is no specific statutory exemption which would permit the SCO to conduct rulemaking without complying with the APA, at this time.

Therefore, OAL concludes that APA rulemaking requirements generally apply to SCO.[5]

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application ***or*** the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce ***any*** guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, ***unless*** the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]." (Emphasis added.)

In *Grier v. Kizer*,[6] the California Court of Appeal upheld OAL's two-part test[7] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*

- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a "regulation" subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*." [Emphasis added.][8]

State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission) (*"SWRCB" v. "OAL"*) (1993)[9] made clear the reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

> "[T]he . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it* . . . ." [Emphasis added.]

Although SCO identifies its complaint processes as being a directive from the State Personnel Board ("SPB") or a form used only for its internal management, that is not dispositive of the issue of whether the material in the training books contain "regulations." The contents must be considered in light of the two-part analysis described in *Grier*, above.

Background of the SCO Discrimination Complaint Process and Affirmative Action Complaint Process

The SPB is vested with the jurisdiction and responsibility for establishing and maintaining personnel standards on a merit basis.[10] It has been authorized to adopt rules of practice and procedure for the investigation and hearings of discrimination, harassment, and retaliation complaints.[11]

Pursuant to that authority, the SPB promulgated Title 2, CCR, section 547.1, which states in part:

> "A complaint against an action, decision, policy or condition which is within the authority of the appointing power to resolve shall be first considered by the appointing power before referral to the Personnel Board . . . . Each complaint must be in writing and state clearly the facts upon which it is based, and the relief requested, in sufficient detail for the reviewing authority to understand the nature of the complaint and who is involved. Each appointing power may establish a written procedure through which an employee may obtain consideration for an allegation of discrimination. All such procedures are subject to the approval of the executive officer. Until the appointing power establishes an approved procedure, the standard procedure prescribed by the executive officer shall apply."

In its agency response, SCO states the SPB supplied SCO with documents regarding the state and federal laws and SPB Guidelines, and pursuant to the authority granted it by Title 2, CCR, section 547.1, SCO promulgated the documents at issue concerning the SCO complaint process.

This Request for Determination

This request for determination was filed on April 11, 1995, by Gaye Welch-Brown, while employed by the SCO. The request was whether pages 16-20 and 44-48 of SCO's Affirmative Action Training Book and page 12-14 of SCO's Sexual Harassment Awareness Training Handbook contained "regulations" as defined in Government Code Section 11342, subdivision (g); whether the information in the specified pages was valid and enforceable at anytime prior to December 31, 1994; and whether it was currently valid and enforceable.

Some specific examples of material contained in the training books follows:

> "The discrimination process does not replace the current grievance process, but provides a separate and distinct avenue for discrimination complaint resolution. Employees may not file concurrent complaints through the discrimination complaint and grievance procedures to seek resolution of the same issues. . . ."[12]
>
> "Employee Responsibility
>
> 1. Employees have the individual responsibility to either inform the harasser that his/her behavior is unwelcome, offensive, and highly inappropriate.
> 2. Inform his/her supervisor of the inappropriate behavior.
> 3. Inform the Affirmative Action Office of the inappropriate behavior.
>
> If an employee feels threatened or has difficulty expressing disapproval, informal assistance and counseling should be sought from the Affirmative Action Office or sources outside the Department such as advocacy and special interest groups, employee organizations, local women's organizations, or community counseling centers."[13]
>
> "The Steps in the Process
>
> 1. Employees who believe that they have been discriminated against should first discuss the problem with the Affirmative Action Office. This should take place within 30 calendar days after either the date of the action felt to be discriminatory or the date the employee becomes aware of a discriminatory action, decision, or environment. . . .
> 3. If a solution cannot be reached, the employee decides whether or not to file a formal complaint. Formal complaints must be filed with the department's Affirmative Action Officer within 15 calendar days of the final session with the EEO Counselor. . . ."[14]
>
> The SCO discrimination complaint form contains this statement: "I declare under penalty of perjury that the foregoing is true and correct."[15]

The agency response states the information in the handbooks does not constitute a "regulation" because it is not a standard of general application; the information is merely a collection of excerpts from a handbook written to inform SCO

employees of an internal discrimination complaint process. Furthermore, the information at issue "is not within the purview of the laws or rules enforced by the Controller on the citizens of the State of California."[16] SCO contends the challenged documents are merely documents relating to the internal management of the office. The information is designed to inform the employees of the complaint process, so they can decide whether to fill out the complaint form; and that forms are exempt from the regulatory process. In addition, SCO argues the challenged documents are merely reprints of documentation from the SPB, so the documents are exempt from the APA.

A. ARE THE CHALLENGED RULES STANDARDS OF GENERAL APPLICATION?

On page forty-four of SCO's "Affirmative Action Training Book," the section entitled "Complaint Procedure" states:

> "It is the purpose of *this procedure* to provide *all employees of the State Controller's Office* with *a uniform method* for voicing allegations and complaints of discrimination and to assure that such allegations and complaints receive prompt and impartial consideration to bring about a satisfactory resolution for all concerned."[Emphasis added.]

The SCO response contends that "[a]lthough the materials are for use by all SCO employees, this is still not sufficient to constitute usage by a class or kind . . . ."[17] The agency response argues that to constitute a "regulation" under the APA the rule must apply *to the public*.

However, for an agency process to be of "general application," it need not apply to all citizens of the state or to the general public. It is sufficient if the rule applies to members of a class, kind, or order.[18]

In *Poschman v Dumke,*[19] the court found a resolution of the trustees of the California State colleges which revoked the prior grievance procedures of their employees was a "regulation." In *Armistead v. State Personnel Board,*[20] the court found a rule pertaining to the ability of state employees to withdraw their resignations prior to the effective date of the resignation was a "regulation." Both cases illustrate that *a rule need not apply to the general public* for it to constitute a *"standard of general application."*

The rules at issue are expressly intended "to provide *all employees* of the State Controller's Office with a *uniform method for voicing allegations and complaints of discrimination* . . . ." [Emphasis added.][21] Therefore, the rules pertain to all members of the class of SCO employees. Hence, *the rules are a standard of general application.*

B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

The SCO stated in its response that part two of OAL's test, *supra*, was not met because:

> "the matters here are simply information supplied internally to employees regarding a discrimination complaints *procedure*. The materials, and the *procedure* they describe . . . pertain to the employer-employee relationship. This is not within the purview of the laws or rules enforced by the Controller on the citizens of the State of California."[22] [Emphasis added.]

Government Code section 11152, provides in part:

> "[s]o far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department . . . ."

SCO specifically admits in its response that it uses the challenged rules as the agency's procedure when dealing with complaints in this area of the law. SCO has the authority to adopt regulations to govern its internal procedures pursuant to Government Code section 11152.

SCO defends the use of its written discrimination complaint process as a simple restatement of governing law, including California statutes and governing relevant regulations. OAL acknowledges that this "process" does contain some policy statements about discrimination which are arguably a restatement of California law.[23]

The challenged rules had been in effect at the SCO prior to 1994 when the requestor made her initial discrimination complaint under the SCO process. The challenged rules continued to be in effect when the initial request for determination was filed in early 1995. SCO has formally promulgated no regulations in this area in the interim. Instead, SCO has relied upon its argument that its internal complaint procedure fits under the umbrella of the State Personnel Board's regulation; Title 2, CCR, section 547.1. There are several problems with SCO's argument.

First, the SPB regulation states that any agency *may* chose to develop its own *written* procedure.[24] SCO concedes it did implement its own written procedure pursuant to the authority granted under that SPB regulation. That is readily apparent since the SPB regulation is approximately 2 paragraphs in length and the SCO procedure is nearly 10 pages in length. In developing its own procedure SCO greatly amplified the SPB regulation. The authority granted departments to create their own written procedure did not excuse the departments from complying with the rulemaking procedures required by the APA. SPB lacks authority to grant such an exemption.[25] The SPB regulation refers only to the additional review and approval by SPB that the rulemaking agency must obtain to use its own procedure.[26]

Second, SCO argues, whereas it did develop its own written procedure, that procedure was primarily just a restatement of documents supplied by SPB as examples of an appropriate complaint process. SCO cannot rely upon that as an excuse for not adopting its own complaint procedure pursuant to the APA. Unfortunately, the examples of an appropriate complaint process supplied to SCO by SPB had also never been adopted pursuant to the APA.

SCO's written discrimination complaint procedures admittedly *govern the agency's procedures* for handling the discrimination complaints of its employees. Therefore, *the second part of OAL's test of a "regulation"* [Gov. Code, section 11342, subd. (g)] *has also been satisfied. Accordingly, OAL concludes that the procedures are "regulations" and are without legal effect until they have been adopted pursuant to the APA.*

III. DO THE CHALLENGED RULES, WHICH HAVE BEEN FOUND TO BE "REGULATIONS," FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION TO APA REQUIREMENTS?

All "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute,[27] as discussed above, or unless the conditions of a general exception are met. The SCO argues that even if its complaint procedures meet OAL's two-part test for a "regulation," the rules fall within either the internal management or form exceptions to the APA.

INTERNAL MANAGEMENT

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

> "Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*" [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][28]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."[29]

SCO contends its complaints process only affects its own staff.[30] SCO also contends that it does not adversely affect an SCO employee from bringing a discrimination complaint before several other state agencies with concurrent jurisdiction over a discrimination complaint.[31] However, when an agency has its own internal discrimination complaint procedure, employees *must* submit any complaint to their appointing power in an attempt to resolve it *before* they may submit their complaint to the SPB.[32] Furthermore, the issue of discrimination within state government is a matter of serious consequence involving an important public interest which goes beyond the interests of a single employee or the employees of a single department. In addition, if an employee sues a department for discrimination and prevails, the money which must be paid to the employee is taken from the money paid by the taxpayers of the state. Consequently, the issue of discrimination in state employment and what can be done about it is one that affects the general interest. As such, *it does not meet the criteria for the internal management exception to the APA.*

FORMS AND INSTRUCTIONS

OAL will next consider whether the form used for the discrimination complaint falls within the forms exemption to the APA.

SCO argues that at least a portion of its discrimination complaints process is exempt from APA requirements as it is a form.[33] SCO further argues that all other information mentioned by the requester in her request:

> "can be classified, arguably, as 'instructions relating to the use of the form.' (Gov. Code 11342(g)). The reasons that all of the information preceding page '14' can be categorized as such, is because all said material is information designed to inform the employee of the complaint process which, from the employee's perspective, revolves around whether or not to fill out the complaint form, and if so, how to fill it out. Consequently, the challenged rules, at least in part, are exempt from promulgation under Government Code section 11342(g)."

Government Code section 11342, subdivision (g), provides in part:

> "'Regulation' does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.*" [Emphasis added.][34]

This statutory provision contains a significant restriction on the use of the "forms" exception.

> "According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a 'statutory exemption relating to *operational* forms.' (Emphasis added.)[35] An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant."
>
> "By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal

regulation is '*needed to implement the law under which the form is issued.*' For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., 'no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.' [Emphasis added.]"

"In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements."

OAL has issued a previous determination limiting the "forms exemption" to the APA.[36]

SCO's complaint form requires it to be signed *under penalty of perjury*. SPB's rule (Title 2, CCR, section 547.1) has no such requirement. This requirement is clearly a uniform substantive rule as discussed in *Stoneham*: a rule which uniformly applies to all persons considering filing a complaint, a rule which is substantive because it requires signing under penalty of perjury.

There is also a fundamental problem with the SCO's argument concerning the forms language in Government Code section 11342. An interpretation of this language which would permit agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form, let alone in ten pages of "instructions" for completion of the "form," would result in the exception swallowing the rule. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in such a way as to free SCO from its APA compliance responsibilities.

CONCLUSION

For the reasons set forth above, OAL concludes the discrimination complaint process, including the discrimination complaint form, and the affirmative action complaint process, as set forth in SCO's training books, contain "regulations" which are without legal effect until adopted in compliance with the APA.

DATE: January 8, 1999

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ENDNOTES

1. This Request for Determination was filed by Gaye Welch-Brown, while an employee of the SCO, 8340 Dressage Way, Sacramento, CA 95829. (916) 324-2086. The Agency Response was filed by Geoffrey F. Margolis, SCO Staff Counsel, P.O. Box 942850, Sacramento, CA 94250. (916) 445-7089.

2. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "*'Determination'* means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is ***invalid and unenforceable*** unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, *or*,
> >
> > (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 [now 11340.5] in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b) [now subd. (g)] yet had not been adopted pursuant to the APA, was *"invalid"*). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

3. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400, and *Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act.*" [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

4. Government Code section 11342

5. *See Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (Unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr.596, 601).

6. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n.3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

   Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

7. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' **(1987 OAL Determination No. 10**, *supra*, slip op'n., at p.8.)

   OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

8. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

9. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

10. Government Code section 19800.

11. Government Code section 18675.

12. SCO's Affirmative Action Training Book, "Discrimination," p. 16.

13. SCO's Affirmative Action Training Book, "Sexual Harassment Policy," p. 19.

14. SCO's Sexual Harassment Awareness Training Handbook, p. 12.

15. SCO's Sexual Harassment Awareness Training Handbook, p. 14.

16. Agency Response, p. 4.

17. Agency Response, p. 3.

18. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See also, *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

19. See endnote 6.

20. See endnote 6.

21. Agency Response, p .3.

22. Agency Response, pp. 3-4.

23. SCO refers generally to all governing law, whether it be Federal or California Statutes or Regulations. See Agency Response to Request for Determination page 5, and the attached referenced laws and regulations contained in Exhibit "C" of the Agency Response entitled "Legal Authority." Included in this Exhibit "C" is also referenced materials from the SPB for the area of Equal Employment Opportunities, which specifically deals with discrimination complaints. OAL cannot consider uncodified regulations or policy from the SPB in the area of Equal Employment Opportunities (including any written or unwritten procedures or processes) as governing legal authority because it would directly contravene Government Code section 18215, subdivision (a), which expressly requires such policies to be adopted pursuant to the APA.

24. Title 2, CCR, section 547.1.

25. Government Code section 11346 (only the Legislature can grant exemptions to the APA).

26. **1998 OAL Determination No. 40** (Department of Personnel Administration, December 9, 1998, Docket No. 96-008), California Regulatory Notice Register 99, No. 3-Z, January 15, 1999, p. ___, note 12 (citing a 1987 OAL decision on a proposed regulation involving Government Code section 19990). Section 19990, among other things, required that state agency incompatible activity statements be approved by the Department of Personnel Administration ("DPA"). The 1987 OAL decision concluded that the DPA approval requirement did not excuse individual agencies from also adopting rules concerning

incompatible activities pursuant to the APA. Government Code section 11346.

27. The following provisions of law may permit rulemaking agencies to avoid the APA's requirement under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)

    c. Rules that "[establish] or [fix], rates, prices, or tariffs." Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec.11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)

    f. There is weak authority for the proposition that contractual provision previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

28. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)

29. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.

30. Agency Response, p. 3.

31. Agency Response, p. 4.

32. Title 2, CCR, section 547.1.

33. Agency Response, p. 4.

34. Government Code section 11342, subdivision (g).

35. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

36. **1993 OAL Determination No. 5** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, Volume 2-Z, January 14, 1994, p.61, 105; typewritten version, p. 266.